GL09-20.3 **GUIDELINES FOR AUTHORIZATION OF VOLUNTARY CONSERVATION ACTIVITIES ON STATE-OWNED AQUATIC LANDS**

DISCUSSION:

This document provides guidance to Washington State Department of Natural Resources (DNR) staff on how to authorize voluntary conservation efforts (i.e., not required under a regulatory framework) made by entities to improve the natural conditions of state-owned aquatic lands. The goal of authorizing conservation activities is to protect and/or improve the biota, ecological services, and natural functions of aquatic environments. By authorizing conservation activities, DNR is implementing its mandates of ensuring environmental protection, ensuring public access and use, supporting renewable resources, and generating revenue (RCW 79.90.455).

IMPLEMENTATION:

This guideline supersedes all other sources of information developed by the DNR regarding the authorization of conservation activities on state-owned aquatic lands. The guidelines will be evaluated after one year of implementation to determine if changes are needed and if the program is functioning as desired. This document should be placed in the Aquatic Resource Management Reference Manual as Section 20.3.

Division and Region Managers will ensure that Guidelines are brought to the attention of all employees and maintained on file in locally maintained Policy Manuals. The Office of Policy Development and Management Systems, or comparable executive office, will ensure that Guidelines and a current index are available on the DNR Intranet.

Approved By: **/S/**
Loren J. Stern
Aquatics Program Manager

Approval Date: 09-09-04

SEE ALSO:

RCW 79.90.450 Aquatic lands – Findings
RCW 79.90.455 Aquatic lands – Management guidelines
RCW 79.90.460 Aquatic lands - Preservation and enhancement of water-dependent uses - Leasing authority
RCW 79.90.465 Definitions

Table of Contents

1. Introduction

Habitat improvement activities may take place on state-owned aquatic lands through several mechanisms. This guidance focuses on authorizing habitat improvement activities (referred to hereafter as conservation activities) on state-owned aquatic lands through a lease or a license. The actions carried out under this guideline will:

- Encourage efforts by public agencies (other than the DNR) and private parties to restore, enhance, create, and preserve aquatic habitat on state-owned aquatic lands;
- Provide an easy and effective mechanism to authorize conservation projects; and
- Protect the public's broader interests, including environmental protection and other public benefits, in the management of the state-owned aquatic lands.

This guidance should be consulted when requests are made to use state-owned aquatic lands for non-mitigation-related conservation activities. Upon request from project proponents, DNR staff should evaluate areas for conservation activities, determine the appropriateness of the activity, and identify the applicable use authorization document. It is anticipated that land managers will play an active role in communicating conservation opportunities to potential project proponents, including non-governmental organizations, state agencies, and the general public. Land managers are encouraged to establish and maintain relationships with parties that may be interested in using state-owned aquatic lands for conservation purposes.

2. Definitions

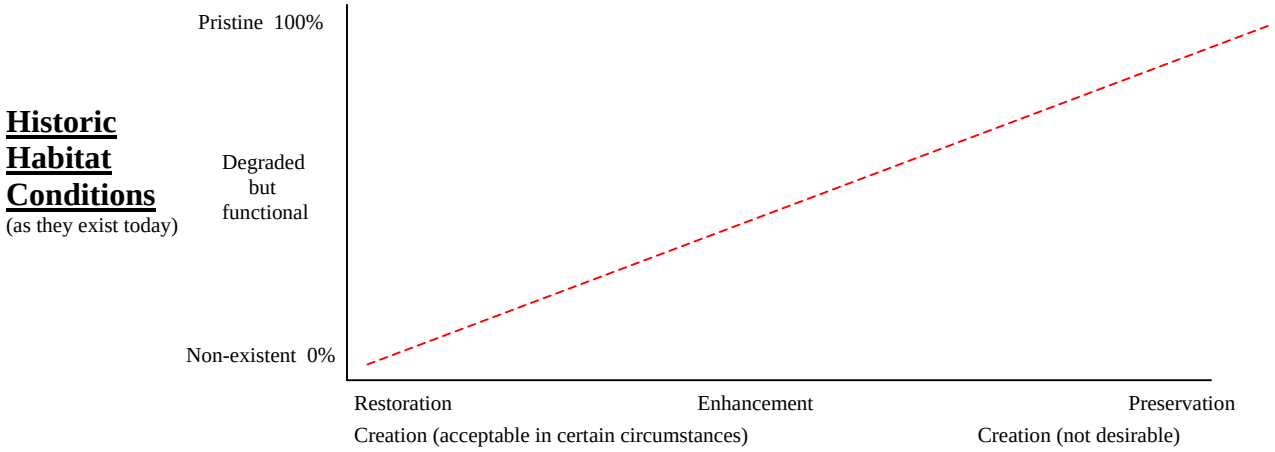
Conservation activities are voluntary efforts (i.e., not required under a regulatory framework) made by entities to improve the natural conditions of state-owned aquatic lands. For the purpose of this guideline, "conservation activities" may include preservation, enhancement, restoration, and creation activities. This guideline adopts pre-existing regulatory definitions for "preservation," "enhancement," "restoration," and "creation" to provide consistency within DNR and with external entities. DNR staff should be aware, however, that land management and restoration practitioners in academia, government, and the private sector often do not apply the same definitions to these terms or they use different terms to describe the same activities. As such, when DNR staff work with project proponents to describe conservation proposals, it should be realized that not everyone will agree with or want to apply these standardized definitions to their proposed work.

It is also important to note that conservation activities implemented under this guidance are not done to fulfill regulatory requirements to compensate for adverse environmental impacts from projects. While compensatory mitigation activities and mandatory clean-up activities (that are required under a regulatory framework) will likely use the same definitions for preservation, enhancement, restoration, and creation, they serve a different purpose and are not included in this guidance. The authorization of compensatory mitigation activities and mandatory clean-up activities should follow guidance for mitigation activities or guidance for capping. These projects will not be authorized under a conservation authorization.

Probably the most important assumption to understand concerning the definitions of preservation, enhancement, restoration, and creation, is that they all use the historic habitat at any given site (i.e., what naturally occurred at the site before it was manipulated by man) as a reference point. In other words, the current condition of the historic habitat determines what type of activity occurs on a site (see Figure 1). In this sense, conservation activities can be described as being on a continuum. For example, if the site is completely degraded to the point that it has lost all of its historic aquatic functions, then the site can only be restored. If a site is degraded but still retains some of its historic aquatic functions, then the site can only be enhanced. And if a site is pristine, by definition, it can only be preserved (the site cannot be enhanced or restored). Given the historic reference point used for the definitions, restoration, enhancement, preservation and are mutually exclusive from one another. This is not to say that a combination of these activities cannot occur within one project, but they typically cannot occur on the exact same site.

Creation is another issue. Creation of new or different aquatic habitats, by definition can occur anywhere along the continuum (i.e., on non-functional, degraded, and pristine sites). Creation could occur in degraded systems if deemed appropriate but is not desirable in properly functioning habitats. The definitions adopted from Regulatory Guidance Letter (US Army Corps of Engineers, No. 02-2, 2002) and examples of conservation activities are listed in 2.1 through 2.4, below.

Figure 1. Conceptual Continuum of Conservation Activities Based on Historic Habitat Conditions



2.1 Restoration

Restoration occurs on sites that have been degraded to such an extent that they no longer provide any of their historically occurring natural aquatic functions. The goal of restoration activities is to return naturally occurring or historic functions to the site. Examples of restoration activities include: removing fill from historic shorelands to re-establish a lake's natural beach, elevation gradient, and aquatic functions; or removing invasive plants (that have colonized a historic saltwater marsh to the extent that it is non-functional) and planting native species.

2.2 Enhancement

Enhancement occurs on sites that have been degraded relative to their historic habitat conditions, but they still retain some level of aquatic function. Enhancement activities include manipulation of site characteristics to heighten, intensify, or improve specific functions. Enhancement activities also include habitat improvements that increase species abundance or levels of production. Examples of enhancement include: depositing material (cultch) to attract native oyster larvae and build up native oyster populations; installing large-woody debris in river banks to increase channel complexity and habitat available for juvenile fish; or placing gravel on a beach to improve beach spawning habitat.

2.3 Preservation

Preservation occurs on sites that are relatively intact compared to their historic habitat conditions. Preservation is accomplished through the removal of a threat to, or preventing the decline of, site conditions by preventing an action in or near the site. Aquatic functions are maintained at current conditions and protected from future activities. Examples of preservation actions may include, among others: encumbering the site as a conservation site; restricting activities on the site; monitoring the site for non-native species and preventing them from becoming established; and education and outreach efforts that call attention to the intrinsic natural values of the site and encourage its preservation.

2.4 Creation

Creation can technically occur on any site, regardless of the condition of the site relative to its historic condition. Creation activities include the development of specific types of aquatic species and/or habitats that have not previously existed on the site and are artificially developed (or "created"). Creation can include changing terrestrial habitat to aquatic habitat and/or changing one type of aquatic habitat into a different type. Examples of creation include: creating riverine oxbows or sloughs in areas where they did not historically occur; filling a subtidal area to create intertidal areas; or digging blind tidal channels where none previously existed.

3. Background

According to Revised Code of Washington 79.90.455, the DNR must manage state-owned aquatic lands in a manner that provides a balance of public benefits. Those public benefits are varied and include encouraging public access, fostering water-dependent use, ensuring environmental protection, utilizing renewable resources, and generating revenue (when consistent with the other public benefits). However, some projects located on state-owned

aquatic lands adversely impact, and potentially threaten, the state's natural resources. As such, the DNR should undertake other actions to improve aquatic resources.

While authorizing activities on state-owned aquatic lands and implementing its mandate to "ensure environmental protection," DNR will seek to improve the function and condition of state-owned aquatic lands through non-mitigation-related preservation, restoration, enhancement, and creation activities (i.e., conservation activities). In addition to using a conservation lease or license, these activities can be accomplished in areas that have been designated as DNR aquatic reserves or on lands that have been "withdrawn" from leasing by an order from the Commissioner of Public Lands. While these mechanisms provide similar opportunities for conservation, the process for requesting the use of state-owned aquatic lands for conservation, and the relationship between DNR and the proponent differ depending on if it is a conservation lease or license, an aquatic reserve, or a withdrawn area. The specific differences are outlined below.

3.1 Conservation Lease or License

To initiate a conservation lease or license, the project proponent must apply for the use of state-owned aquatic lands. In doing so, the proponent must clearly identify the use of the land and associated management activities and desired goals (as described in Sections 4 - 7). Land managers must apply all relevant use authorization guidance in determining the appropriateness of the conservation activity, similar to the process for proposed commercial uses. The lease or license establishes a landlord-tenant relationship and transfers some management authority of the property from DNR to the project proponent for the term of the authorization.

3.2 Aquatic Reserves

To designate a site as an aquatic reserve, proponents will need to demonstrate, through a public application process, that the area meets the criteria set forth in the reserve program (WAC 332-30-151). Activities within a reserve must support the purpose of the reserve and will often equate to conservation activities. Aquatic reserves are designated for a 90-year term. Public review of aquatic reserves and associated management plans occurs through the State Environmental Protection Act (SEPA) process. The overall management of a reserve is DNR's responsibility unless other arrangements have been made with an external group or agency. The reserve proponent does not have legal obligations to participate in the management of the state-owned aquatic lands within the designated aquatic reserve.

3.3 Withdrawal of Lands From Leasing

The Commissioner of Public Lands may withdraw lands from leasing at his or her discretion. DNR receives requests to withdraw lands based on a variety of reasons, including in support of state parks and areas of biological interest by Washington Department of Fish and Wildlife (WDFW). Under federal Project Cooperation Agreements, DNR also withdraws lands from leasing in cooperation with the Corps of Engineers and local sponsors. Withdrawal from leasing, however, does not necessarily have to be linked directly to conservation activities and could be designated for any purpose. Lands subject to withdrawal are typically not evaluated based on established criteria nor are they typically established within a public

process. Furthermore, the lands usually are not subject to a management plan. DNR maintains ultimate management responsibility for the lands.

3.4 Regulatory Actions

There are two other types of activities that occur on state-owned aquatic lands that involve restoration, enhancement, creation, and preservation – those resulting from compensatory mitigation and those relating to Natural Resource Damage Assessments (NRDA). These activities occur under a regulatory framework and should not be authorized under a conservation lease or license. DNR addresses these specific uses under separate policies. Similarly, conservation activities accomplished under a use authorization should not be applied to gain compensatory mitigation or natural resource damage credits. DNR will continue to work with regulatory entities in order to communicate the differences between the programs and reduce the potential for inappropriate application of conservation activities.

There is limited application for conservation leasing activities in relation to liability under the Endangered Species Act (ESA). In general, implementation of the conservation leasing program may result in positive benefits (reduce liability) for DNR's programmatic "take". However, activities under this program may not be applied to satisfy proponents' ESA related mitigation requirements.

4. Environmental Considerations

The DNR shall determine if the proposed conservation activity is appropriate for the proposed site. This decision will be based on environmental considerations of the site, administrative and legal considerations, and other use authorization considerations. Information, for environmental considerations, can be provided from scientific data, existing plans for the area, and on-site assessments.

4.1 Site Characteristics

Land managers and science staff should evaluate the proposed conservation use in reference to the following:

- Historical and current site conditions;
- Current habitat needs for all affected species;
- Listed species considerations;
- Opportunities for connectivity;
- Feasibility of the activity;
- Appropriateness of the activity with respect to the surrounding landscape; and
- Potential of success for protecting and/or improving natural functions of the aquatic environment.

4.2 Consistency with Other Plans

Where possible, DNR will refer to local and regional planning processes when identifying appropriate sites for conservation activities. Project proponents should identify shoreline master program plans, watershed plans, species recovery plans, or local or regional conservation or restoration plans that apply to the site. The project proponent shall reference such plans and explain how the proposed conservation activity is

consistent with, or inconsistent with, the plan(s). Additionally, DNR should take an active role in reviewing the proposed conservation activities on state-owned aquatic lands including how that use supports bay-wide, landscape, ecoregional, and watershed planning efforts.

4.3 Conservation Activity Preferences

As described in Section 2, conservation activities include preservation, enhancement, restoration, and creation. Since these activities will impact existing conditions on state-owned aquatic lands, DNR has a preference for which activities are implemented. In general, proposed conservation activities must clearly demonstrate that the likely potential outcomes of the activities will improve the habitat conditions relative to current conditions. Additional preference will be given to projects that demonstrate a connection to conservation activities on adjacent uplands and aquatic lands.

In areas that have been functionally degraded or completely lost over time, DNR prefers and will encourage restoration and enhancement of the historic aquatic habitats and functions. Projects that restore or enhance processes are preferred over those that restore or enhance specific features of a site. For example, a proposal to restore or enhance a feeder bluff in order to remove barriers to nearshore sediment movement may be more desirable than a proposal to re-nourish (i.e., enhance) a beach where the physical processes necessary to keep that beach are not functioning.

The preservation of naturally functioning habitat is encouraged and preferred when undertaken with other conservation measures within the same project (i.e., preservation and restoration; preservation and enhancement; etc.). Preservation activities ensure that the present conditions of a site are maintained. Preservation activities not done in concert with other conservation activities within the same project will require at a minimum maintenance, monitoring, reporting, and outreach.

Creation is the least desirable form of conservation and should only be considered when it replaces critical habitat or ecological processes lost elsewhere, occurs in degraded areas, does not impact naturally functioning habitats, and when it is supported by landscape level restoration plans. Creation of new habitats and functions that are not historically occurring will be considered in limited cases where alternative conservation activities are not feasible.

5. Administrative and Legal Considerations

When considering the use of state-owned aquatic lands for conservation activities, DNR staff must evaluate proposed locations for such activities and determine their appropriateness. In doing so, staff must consider statutory and constitutional restrictions on certain aquatic lands and the potential for interference with other public benefits defined in RCW 79.90.455. Once the site is approved, DNR staff must establish an appropriate contractual relationship with the project proponent. There are a number of factors to be considered in making a decision to authorize the use of state-owned aquatic lands for conservation activities, including the land classification, duration of the use, and exclusivity of the use. It is important to note that the intended uses of the

different land classifications and proposed conservation activities may or may not be mutually exclusive. DNR staff must consider potential limitations and conflicts that may result by allowing conservation activities within certain land classes.

Conservation activities, as defined in Section 2, may be sited on different classes of state-owned aquatic lands (see Table 1). In addition to the following conditions, certain preference rights, water access rights, or rights of first refusal may apply (WAC 332-30-122, RCW 79.95.040, WAC 332-30-109).

5.1 First & Second Class Tidelands and Shorelands

Conservation activities occurring on first and second class tidelands and shorelands must be consistent with RCWs 79.90 and 79.94. Tidelands and shorelands may be leased for up to 55 years. Except, first class unplatted tidelands and shorelands may be leased for up to 10 years. Abutting upland owner lease preference rights apply to 1st class tidelands and 1st and 2nd class shorelands.

5.2 Beds of Navigable Waters (Bedlands)

Conservation activities occurring on bedlands must be consistent with RCWs 79.90 and 79.95. Bedlands abutting first-class tidelands and shorelands (while not specifically restricted in RCW) have normally been leased for a maximum of 30 years. Bedlands abutting second-class tidelands or shorelands may be leased for up to 30 years. Bedlands abutting first class unplatted tidelands or shorelands may be leased for up to 10 years, under the same conditions as for those tidelands or shorelands. In accordance to WAC 332-30-122 (ii), "beds of navigable waters may be leased to the owner or lessee of the abutting tideland or shoreland…." However, DNR may lease to other than the abutting owner after the owner is notified of the intention to lease the area and when "…not adverse to the public's ownership, the abutting owner's water access needs may be reasonably accommodated" (WAC 332-30-122(iii)).

5.3 Harbor Areas

As defined by the Constitution of the state of Washington, the primary purpose of harbor areas is to support commerce and navigation. Conservation activities may occur within harbor areas so long as they do not impair opportunities for navigation and commerce. Additionally, activities within harbor areas must conform to authorization terms described in RCW 79.92. Consistent with WAC 332-30-115, authorizations in harbor areas cannot exceed 30 years.

5.4 Waterways

Waterways are set aside as public highways. Consistent with WAC 332-30-117 and RCW 91.08, the priority purpose for waterways is to provide navigation routes between water and land for conveniences of navigation and commerce. Cities and ports have the authority to manage activities in waterways (RCW 79.93) and may allow conservation activities to occur within waterways so long as they do not impair opportunities for navigation and commerce. If the federal government has established a pier head line within the boundaries of a waterway and the local government approves, then the DNR

may issue authorizations for conservation activities in waterways for up to 30 years. The activity may occur in the portion of the waterway between the waterway boundary and a federally established pier head line (RCW 79.93.040). In addition, the conservation activity cannot impede navigation and commerce. Otherwise, waterway permits written by DNR should not exceed five years as per WAC 332-30-117.

5.5 Streets

Article 15 of the Constitution of the state of Washington grants the right for municipal corporations to extend their streets over tidelands; therefore, the municipality retains authority over activities occurring on such streets.

5.6 Port Management Agreements (PMA)

Ports may authorize conservation activities within port management areas (PMAs). Conservation activities may not be considered as compensatory mitigation activities. Ports must receive permission from DNR if any habitat improvement projects will be equated to credits that may apply to satisfy regulatory mitigation requirements in the future. Such projects must be done in accordance with DNR's Compensatory Mitigation guidance. Additional conditions may apply if the PMA also includes a Harbor Area (see Section 5.3).

5.7 Public Places

As described in WAC 332-30-106 (35), "Public Places" are set aside for public access. DNR will authorize conservation activities to occur in designated "public places" only if they do not compromise the area's primary use.

5.8 Aquatic Reserves

Consistent with WAC 332-30-151 and WAC 332-30-106, conservation activities within DNR designated aquatic reserves must be consistent with and support the purpose and objectives of the reserve as identified in the management plan. Authorization terms cannot exceed the terms associated with underlying land class (i.e., shorelands, tidelands, bedlands). Since conservation activities in aquatic reserves may be undertaken through cooperative management efforts, some conservation efforts could happen in a reserve without a lease.

5.9 Current Leaseholds and Authorizations

Conservation activities implemented by a third party within a currently leased area may need the consent of the lessee. Conservation activities implemented by a current lessee within a current leasehold area may require an amendment to the lease. In either case, such activities may constitute a "change of use" and will require a review of the lease agreement, appropriate amendments, and re-negotiation of lease terms.

5.10 Use of State-Owned Materials

The use of state-owned gravel, rock, sand, silt, or other material for conservation activities, as defined above, on state-owned aquatic lands serves a public purpose and

will not require payment of royalty according to RCW 79.90.150. However, the use of these materials will require authorization from DNR.

Table 1. Conservation Activities According to Land Classification

Land Class	Is conservation allowed by DNR?	Term of Use
First and Second Class Tidelands and Shorelands	Yes, preference rights apply to abutting upland owners of 1st class tidelands and 1st and 2nd class shorelands	• Up to 55 years for platted lands • 10 years for 1st class unplatted tidelands and shorelands
Beds of Navigable Waters (Bedlands)	Yes, with special considerations- Generally, DNR leases bedlands to the abutting tideland or shoreland owner. DNR may lease to other than the abutting owner when that owner's water-access needs are accommodated (WAC 332-30-122)	• Up to 30 years for bedlands abutting first and second class tidelands or shorelands • Up to 10 years for bedlands abutting 1st class unplatted tidelands or shorelands
Harbor Areas	Yes, with special considerations- activity must not impair opportunities for navigation or commerce and must conform with RCW 79.92	• Can not exceed 30 years
Waterways	Yes, with special considerations- areas are managed by local city and ports (RCW 79.93). Activities can be allowed by DNR so long as they do not impair opportunities for navigation and commerce (WAC 332-30-117 and RCW 91.08)	• Up to 5 years per WAC 332-30-117 • Up to 30 years with local government's approval and if Federal Government has established a pier head line within the boundaries of a waterway.
Streets	Municipalities retain authority over activities on streets platted over tidelands (WA State Constitution, Article 15)	• N/A
Port Management Agreements	The port may allow conservation activities as long as the activity is not done to satisfy regulatory requirements.	• Terms for harbor areas apply if the PMA includes harbor areas. If outside a harbor area, terms associated with the underlying land class apply.
Pubic Places	Yes, provided the activity does not compromise opportunities for public access	• Terms associated with the underlying land class apply.
Aquatic Reserves	Yes, the activity must be consistent with and support the purpose and objectives of the reserves management plan	• Terms associated with the underlying land class apply.

6. Authorization Considerations

As a matter of process, DNR staff should apply the review process outlined in Section 7 when contemplating authorizing conservation activities on state-owned aquatic lands. In addition, conservation leases and licenses should not be issued until the factors in 6.1 through 6.5 have been addressed.

6.1 Regulatory Permits and State Environmental Policy Act (SEPA)

Like other proposed uses of state-owned aquatic lands, conservation activities must be reviewed and approved by local, state, and federal regulatory permitting authorities, as appropriate. The proposed use should be consistent with applicable plans including: bay-wide and landscape plans, shoreline management plans, and watershed plans.

Conservation activities may require review under the State Environmental Policy Act (SEPA). SEPA may be undertaken by a regulatory agency as part of the permitting process. If not, DNR may have to assume lead agency status and determine whether the activity is exempt or if a SEPA analysis is required. In many cases, if the only activity being proposed is preservation (see section 2.3), then the project may be exempt as per WAC 197-11-800 (5) ((c) which states: "The following real property transactions by an agency shall be exempt: (c) The lease of real property when the use of the property for the term of the lease will remain essentially the same as the existing use, or when the use under the lease is otherwise exempted by this chapter." If other conservation activities are being performed, a SEPA checklist will likely be required. In most cases it is anticipated that conservation activities would be determined to be "non-significant" or "mitigated as non-significant."

6.2 Multiple Uses

There may be circumstances where a proposed conservation activity conflicts with pre-existing or foreseeable future commercial uses. In those situations, land managers should consider its appropriateness given the conflicting use guidance provided in RCW 79.90.460. Similarly, some conservation activities may not be mutually exclusive and could co-exist with other uses. An example of this would be boat moorings in or adjacent to a restored sea grass bed. During the early stages of negotiating a use authorization document, project proponents must clearly identify the goals of the activity to enable land managers to assess its compatibility with other future uses of the land.

6.3 Authorization Terms & Conditions

In general, conservation activities will be authorized in the same manner as other authorizations for use of state-owned aquatic lands. There are two types of authorization documents that could be used for conservation activities – a lease or a license. When determining the type of authorization document that will be used for a conservation activity, land managers should consider both the duration of the use (i.e., the time needed to carry out, evaluate, and protect the value of the conservation activity) and the exclusivity of the site (i.e., the degree to which the results of the conservation activity will depend on granting the proponent more exclusive rights to the site of the proposed

use). Examples of how these considerations will affect the authorization type are provided below.

Duration of Use - If the results of the activity depend on long-term protection of the site, or the activity will be carried out over a long time, or several sequential or complex activities will be carried out over time, a lease will be the most appropriate authorization document. An effort to restore a sea grass bed is an example of an activity that requires a longer term to achieve the desired outcome. In contrast, if the conservation activity can be completed in a short timeframe and the results do not depend on long-term protection of the site, a conservation license may provide adequate opportunity for the activity. A proposal to remove wood waste from a subtidal area is an example of conservation activity that requires a shorter duration of use. In this latter case, the project proponent would have no guarantee that the habitat improvements made to the site would be maintained over time.

Exclusivity of Site - If the results of the activity requires exclusive use of the property or precludes other potential uses of the property, then an authorization document that affords greater rights to the property, such as a lease, would be most appropriate. However, even under a lease there are provisions for multiple uses. For the above examples, proponents for the sea grass restoration would most likely require exclusive use of the site, precluding access and other consumptive uses so that their results are not compromised. Conversely, proponents for the wood waste removal may be more willing to allow multiple uses, including access, to the site because such activities may not impede the overall goal of the activity.

6.3.1 Conservation Lease

Leases can be issued for conservation activities that:

- Occur continuously on a site (i.e., 15 or more days per month);
- Encumber a site for greater than one year; and
- Are exclusive in nature (i.e., the lessee has the expectation that the habitat improvements made to the site will not be disturbed by other DNR use authorizations).

Lease terms are limited in duration by the land classification of the site and never exceed 55 years. The lessee has some level of exclusive use of the site and maintains primary responsibility for site management and protection.

6.3.2 Conservation License

Licenses for conservation activities can be issued:

- For five years in duration when the activities are sporadic in nature (i.e., occur on the site less than 15 days per month). In this case, the project must be completed within the five-year period. Additional five-year licenses should not be issued for the same project. If the project actually exceeds five years in duration, then a lease should be issued.
- For one year in duration when the activities are continuous in nature (i.e., 15 or more days per month). In this case, the project must be completed

within the one-year period. Additional one-year licenses should not be issued for the same project. If the project actually exceeds one year in duration, then a lease should be issued.

Under either scenario, licenses are only used when the project proponent has no expectation that the habitat improvements made to the site will be protected from disturbance by other DNR use authorizations. As such, licenses shall not be used for preservation activities (because preservation requires a long-term commitment), but may be used for enhancement, restoration, and creation activities. The license holder does not have exclusive use of the property and has limited site protection responsibilities. Habitat improvements on state-owned aquatic lands completed under a license are not protected beyond the term of the license.

6.4 Valuation

Under RCW 79.90.460, the DNR has the authority to lease state-owned aquatic lands for water-dependent activities. RCW 79.90.465 defines "water-dependent use" as a use that cannot logically exist in any location but on the water. Since conservation of aquatic habitats and functions cannot logically occur in any location but on the water, conservation activities are water dependent. RCW 79.90.480 describes the procedure for determining annual rental rates for water-dependent lease activities. WAC 332-30-123 gives further guidance on determining rent for water-dependent uses. As such, in accordance with existing statutes and rules, the use of state-owned aquatic lands for conservation activities will be valued as water dependent and subject to fees accordingly. However, charging fees according to current methods may be an interim measure until DNR can pursue a legislative change to allow for discounted use of state-owned aquatic lands for non-regulatory conservation purposes. Until such time, the existing statutes relating to use authorizations will apply to conservation activities.

For rent determination purposes, there are three scenarios under which conservation activities may take place on state-owned aquatic lands:

Scenario A – The conservation activity takes place on state-owned aquatic lands that are located adjacent to uplands that are used (typically by the same entity) in conjunction with the conservation activity.

Scenario B – The conservation activity takes place on state-owned aquatic lands that are located adjacent to uplands that are not used in conjunction with the conservation activity. Under this scenario, for purposes of determining rent, it does not matter if there are non-adjacent uplands (of any kind at any location) that are used in conjunction with the conservation activity.

Scenario C – The conservation activity takes place on state-owned aquatic lands that are not located adjacent to uplands (i.e., on bedlands or detached tidelands and shorelands). Under this scenario, for purposes of determining rent, it does not matter if there are non-

adjacent uplands (of any kind at any location) that are used in conjunction with the conservation activity.

According to RCW 79.90.480 (1), water dependent rent will be charged based on the adjacent upland tax parcel when it is used "in-conjunction" with the leased area. If there are no such uplands, the nearest upland tax parcel used for or in support of water dependent purposes should be used. This can be applied in a straightforward manner for scenario A, as long as all other criteria related to the parcel are met. For scenarios B and C, an alternate parcel must be determined using the sequential process identified in WAC 332-30-123 (4).

For the purposes of determining the "same use class" under WAC 332-30-123 (4)(b)(i), lands used for non-regulatory habitat preservation, restoration, enhancement, and creation activities shall be considered. Examples of lands that fall within the "same use class" include, but are not limited to, the tax-assessed portions (when they exist) of DNR Natural Resource Conservation Areas, state parks, wildlife areas managed by the U.S. Fish and Wildlife Service or the WDFW, or privately-owned natural areas managed by non-governmental organizations for conservation purposes. Regulatory required habitat improvement and protection sites (such as compensatory mitigation sites, Natural Resource Damage Assessment (NRDA) sites, and remediation sites managed under the Comprehensive Environmental Response, Compensation, and Liability, Act (CERCLA) and Model Toxic Control Act (MTCA)) are not in the "same use class" as conservation sites. For the purpose of identifying a "water-dependent use" under WAC 332-30-123 (4)(b)(ii) through (iv), regulatory required compensatory mitigation is considered "water-dependent" while CERCLA and MTCA sites are not considered "water-dependent" or "water oriented." NRDA sites will have to be evaluated on a case-by-case basis to determine if they are "water-dependent" or "water oriented."

For scenarios A, B, and C, any parcel used to determine the water-dependent rent must meet the criteria for an upland parcel as well as a consistent tax assessment as described in WAC 332-30-123 (2) and (3).

If conservation activities are conducted under a license, water-dependent rent must be calculated and prorated as per the length of time the site is actually being used. For example, if the project proponent shall only be on the site for 10 days of each month over a period of two years, then the water-dependent rent for the license shall be based on 240 days of encumbrance (10 days x 12 months x 2 years).

6.5 Proponent Capacity

Proponents of conservation projects on state-owned aquatic lands must complete and submit a formal project application using the use authorization application for conservation projects. In addition, requirements for surveys/exhibits and regulatory permits/approvals are the same as with any application for use. Proponents of conservation activities may also be required to submit supplemental application materials. This latter determination will be made on a project-by-project basis.

Based on the use authorization application, DNR staff must be assured that the proposed project is appropriate for state-owned aquatic lands. In addition, DNR staff must assure that proponents and assignees have the skills, capacity, and resources to complete the project and manage the site, so that environmental protection will not be compromised by an incomplete or failed project. Evidence of a viable application and appropriate project proponent and or assignee include, but are not limited to the issues identified in 6.5.1 through 6.5.3.

6.5.1 Site Manager

Project proponents must designate a site manager for the conservation site. The site manager can be a representative of a private or public entity that will assume the responsibilities of the conservation plan (see Section 6.6), and ensure the protection of the conservation improvements. The site manager should have a combination of education and experience that demonstrates capacity for aquatic natural resource management.

6.5.2 Management Resources

The project proponent will provide funding for the management of the area for the duration of the lease or license. Project proponents should demonstrate that they would be able to fulfill this responsibility, either by providing financial information or evidence of previous, comparable projects.

6.5.3 Bonding

As per RCW 79.92.060, lessees within harbor areas must provide a bond. As per RCW 79.90.525, DNR may require a performance bond, letter of credit, escrow account, or other written financial guarantee for leases outside of harbor areas. In either case, financial guarantees such as bonds may be required to ensure project proponents:

- Pay all rents due;
- Complete proposed habitat improvements;
- Fulfill the required operation and maintenance, monitoring, and contingency plans as listed in the Conservation Plan; and/or
- Remove undesired improvements to the property after close-out of the lease.

If required, the amount of the bond should cover the identified costs plus 10 percent. A performance bond will not be required in situations where prior agreements precluding the use of performance bonds have been negotiated with a project proponent. Requirements for bonding will be determined on a project-by-project basis.

6.6 Conservation Plan (Plan of Operations, Maintenance, & Monitoring)

The conservation plan must contain detailed information about the proposed activities, expected results over defined time periods, and how the site will be monitored and maintained. The plan should employ principles of adaptive management to address

unexpected results or changes without altering the purpose of the intended conservation action. Documentation prepared to secure required permits and approvals may serve as conservation plans. The conservation plan will be attached to and made part of the authorization document.

While there is no standardized format for the Conservation Plan, it should include, at a minimum:

- Project Goals - Project goals should be clearly stated and reflect an ecological endpoint. Goals are to be measured by completed actions leading to physical attributes rather than changes in condition or features of the property. The rationale for the project and its proposed located should be included.
- Measurable Definition of Success - To account for variation in ecological response, success should be defined as a range of acceptable outcomes.
- Project Description & Construction/Installation Schedule - In addition to proposed dates, the construction/installation schedule should include a detailed description of what will be done (i.e., re-grading riverbanks and installation of native riparian vegetation and root wads); plan drawings for the project; sequence of events; techniques to be used; planting schedule and species lists; as well as any other information detailing the proposed work.
- Monitoring Plan - The project proponent is responsible for including a monitoring component in the Conservation Plan and conducting the monitoring. Monitoring must assess whether the conservation activity has been implemented appropriately and if the activity is effective (i.e., performing as designed). The monitoring component must include reports to DNR that analyze the monitoring data, assess the success of the activity, and modify maintenance activities in response to findings. Monitoring must also include both short and long range activities to ensure the project's success and that the goals are met.
- Maintenance Plan - A schedule for ongoing maintenance activities that will be carried out over the term of the lease or license must be part of the Conservation Plan. Long-term maintenance of a restored feature is required if a restoration activity is not maintained naturally. Maintenance activities must also consider other potential outcomes of the proposed activity and plan alternative responses to the mostly likely outcomes. If the project's conservation activities are failing and the identified contingency measures and corrective actions are not successful, or an unanticipated failure occurs that is not addressed by the stated contingencies, the proponent must contact the DNR. The proponent and/or site manager must work with the DNR to address how to best achieve the stated performance standards.
- Adaptive Management Strategies - Conservation activities may fail and it is critical that the proponent have a defined set of actions she/he will undertake to ensure the project's success. The application should outline adaptive management responses to anticipated range of project performance.
- Reporting Schedule – Project proponents will describe through a regular reporting schedule a synthesis of monitoring findings and their relationship to identified measures of success. This should include site visit intervals for the proponent and assigned Region staff, data presentation and frequency of reporting.

6.7 Lease Jacket Maintenance

Proper maintenance of the lease jackets for use authorizations relating to conservation activities will assist DNR in identifying whether or not management of the site is protecting and/or improving the biota, ecological services, and natural functions of aquatic environments. The documentation included in lease jackets for conservation uses will necessarily vary slightly from those maintained for other activities due to the particular requirements of demonstrating that conservation activities are achieving their intended purpose. While similar documentation is a standard part of DNR lease jacket management, additional tracking activities for conservation activities are crucial to successful oversight due to the risk inherent in modifying habitat. DNR shall maintain files and collect documents from the project proponent, DNR, and other sources. In addition to documents normally contained within the lease jackets, the lease jackets shall include, at a minimum:

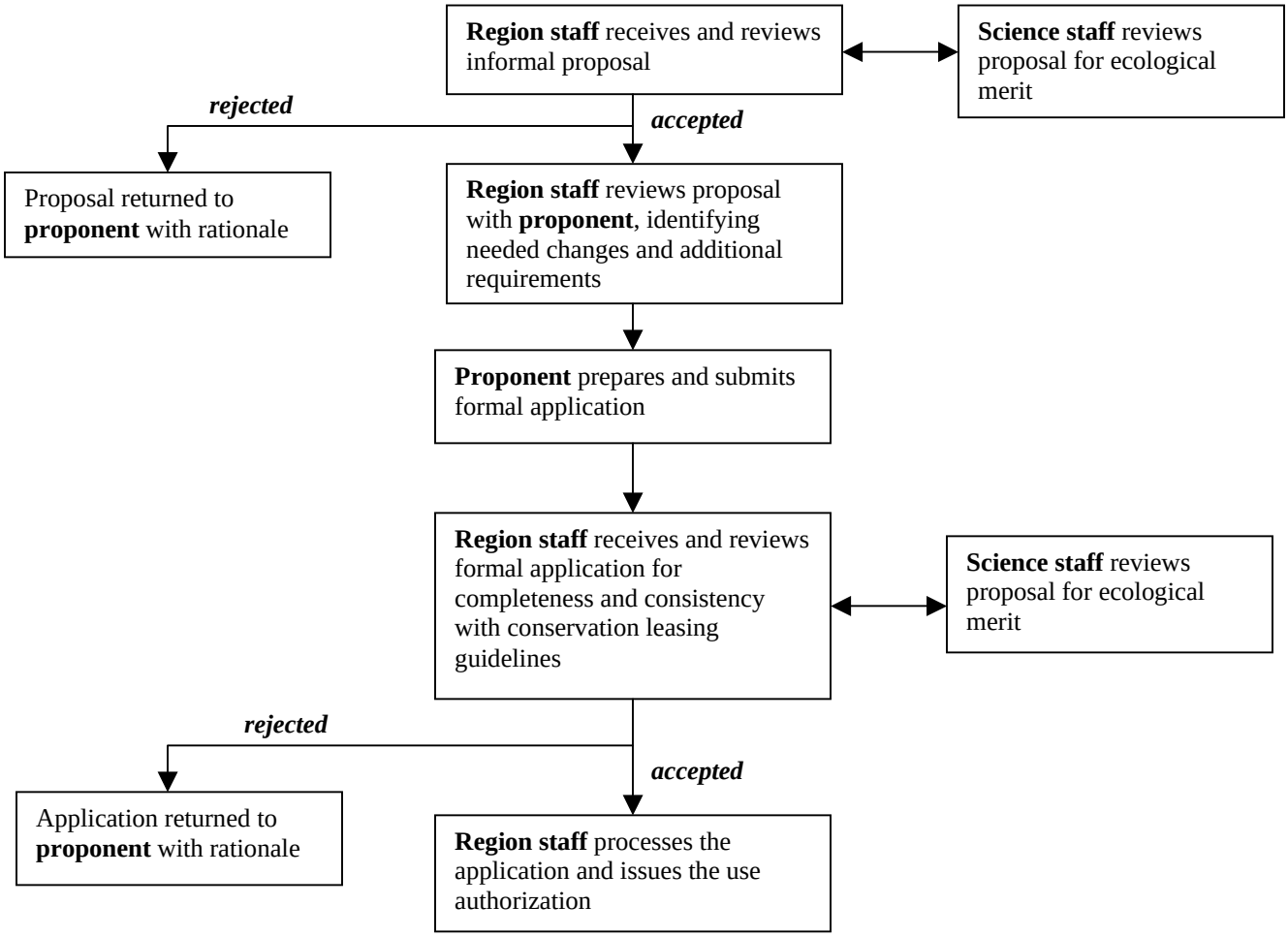
- Baseline report describing the conditions of the natural resources contained within the leased area and immediately adjacent to the encumbered area.
- Monitoring reports prepared and submitted by the project proponent. While the exact format and content of monitoring reports will be individualized for each site, monitoring reports should be submitted no less than once every five years.
- Point of contact statement. It is incumbent on the project proponent to notify DNR of any changes in the point of contact (a.k.a. site manager) for an individual site. This information and official communications between DNR and the point of contact will be maintained in the files.
- Images log that includes aerial photos of the site, photos of the site from designated monitoring points, and maps of the site.

7. Project Application & Review Process

Conservation activities, within the parameters described above, are an appropriate use of state-owned aquatic lands. The actions described in this guidance should be applied when conservation activities (i.e., restoration, creation, enhancement, and preservation) are proposed for state-owned aquatic lands and are not related to compensatory mitigation, remediation of contaminated sediments, natural resource damages, an aquatic reserve application, or withdrawal from leasing request. The authorized activities should be consistent with DNR's management responsibilities, legislative mandates, and agency rules.

This section describes a generalized process for reviewing conservation proposals, as well as several decision points and feedback processes (see Figure 2). Essentially, there are two sequential phases to project review – the informal project proposal review and the formal project application review. Staff from DNR's Aquatic Resources Division Scientific Support Section (scientific support staff) is available to review and comment during both phases. Specific considerations for each step are discussed in more detail in following sections. These considerations augment standard application review practices.

Figure 2. Flow Diagram For Approval of Conservation Projects



7.1 Proposal Receipt and Review

Before a formal application is made, proponents of conservation activities will be required to submit an informal project proposal for review by the appropriate region and science staff. While there is no standard format for the proposal, it should include all conceptual elements of the project (i.e., who, what, when, where, why, and how). The informal project proposal will describe the conservation concept and should include a site visit by the proponent and DNR staff. In addition, the proposal must include:

- Project goals and objectives - project goals and objectives should be clearly stated and reflect an ecological endpoint.
- Measurable definition of success - to account for variation in ecological response, success should be defined as a range of acceptable outcomes.

Review of the informal proposal will focus on the benefits of the proposed conservation activities to species of concern, the feasibility of the proposed activities, and consistency with both surrounding land use and DNR planning efforts.

7.1.1 Region Staff

Region staff should review the proposal to determine whether the project meets the definition of conservation activity (see Section 2). If so, the most appropriate type of authorizing document must be determined (see Section 6.3). Environmental and Legal considerations (see Sections 4 and 5, respectively) should be weighed along with consistency with local/state land use planning efforts. In addition, an assessment should be made as to whether the proponent has the skills, capacity, and resources to both complete the proposed conservation activities and manage the site (see Section 6.5).

7.1.2 Science Staff

The proposal should be routed to the Scientific Support Section supervisor for assignment within the Scientific Support Section. Scientific review will be for ecological merit of the proposal. The assigned scientist will provide region staff with a written assessment of the proposal, including an appropriate rationale for their support or lack of support for the proposal. Assessments will focus on feasibility of the proposed project, likelihood of conservation benefits, expected ecological benefits, and the degree to which the project addresses known species' needs. The assessment will also include discussion of site characteristics (see Section 4.1), consistency with other planning efforts (see Section 4.2), and consistency with conservation preferences (see Section 4.3). Assessments will be based on a qualitative scale of:

- Strongly Support
- Somewhat Support
- Don't Support

Region staff will use the assessment, in conjunction with other information and criteria, to determine if the project is viable and appropriate for the proposed site.

7.2 Proponent Review

Once a determination has been made as to whether the proposal should be accepted or rejected, the district lead should contact the proponent to discuss DNR's decision. Both rejections and approvals should be formally documented. If the project is approved, region staff should specify to the proponent any needed changes, as well as review the formal application process.

7.4 Application Review

Similar to the pre-application review of the informal project proposal, staff should evaluate the formal project application for overall merit and consistency with both surrounding land use and DNR planning efforts.

7.4.1 Regional Staff

As with other use authorizations, region staff will review the application for completeness and work with the proponent to remedy any omissions.

7.4.2 Science Staff

As in the initial review of the proposal, science staff will not be leading the review of the application, but will be providing Region staff with input regarding the feasibility of proposed conservation activities, identification of appropriate goals and measures of success, and adequacy of the identified monitoring and remedies. The evaluation will also include discussion of site characteristics (see Section 4.1), consistency with other planning efforts (see Section 4.2), and consistency with conservation preferences (see Section 4.3). When possible, staff will provide feedback as to how the proposal can be improved including needed Staff will again document whether they strongly support, somewhat support, or don't support the project and why.

Once a determination has been made as to whether the application should be accepted or rejected, the region lead should contact the proponent to discuss DNR's decision. Both rejections and approvals should be formally documented. If the application is approved, the region staff should specify to the proponent any needed changes, along with lease terms and conditions. Regardless of whether the application is accepted or rejected, the responsibility for improving and/or correcting the application and project elements rests with the applicant, not DNR staff.